



Bail Slip

The Appellants/Accused 1&2 namely 1)Sundar Singh, Male aged 51, S/o Yovan, 2)Mohamed Ali, Male aged 45, S/o Ahamed Khan, were directed to be released on bail as per the order of this Court dated 1/3/2016 in Crl.Mp(MD)1891 & 1892/2016 in Crl.A(MD)70/2016 on the file of this Court.

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 25.08.2021

CORAM:

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

Crl.A.(MD)No.70 of 2016

1.Mohamed Ali

2.Sundar Singh

: Appellants/Accused No.1 & 2

Vs.

The State represented by,
The Inspector of Police,
Vadaseri Police Station,
Kanyakumari District.
(Crime No.2940 of 2011)

: Respondent/Complainant

PRAYER: This Criminal Appeal is filed under Section 374(2) of the Code of Criminal Procedure, to call for the entire records pertaining to the judgment rendered by the Hon'ble II Additional Special Court for NDPS Act Cases, Madurai, in C.C.No.159 of 2014 dated 06.02.2016 and set aside the same and consequently acquit the appellants honourably.

For 1st Appellant : Mr.V.Kathirvel
Senior Counsel
for Mr.S.Balaji

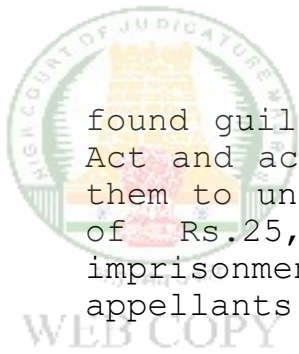
For 2nd Appellant : Mr.N.Mohidheen Basha
for Mr.S.Balaji

For Respondent : Mr.M.Muthumanikkam,
Counsel for Government of
Tamil Nadu (crl.side)

JUDGMENT

This present criminal appeal is directed against the conviction and sentence dated 06.02.2016 made in C.C.No.159 of 2014 on the file of the learned II Additional Special Court for N.D.P.S Act Cases, Madurai.

2.The appellants are arrayed as Accused Nos.1 and 2 in the above referred case. They stood charged for the offence punishable under Sections 8(C) r/w 22 (b) of NDPS Act. After full-fledged trial, the learned II Additional Special Judge for N.D.P.S Act cases, Madurai, came to the conclusion that both the appellants are



found guilty for the offence under Section 8(C) r/w 22 (b) of NDPS Act and accordingly, convicted the appellants and sentenced each of them to undergo three years rigorous imprisonment and to pay a fine of Rs.25,000/-, in default, to undergo six months simple imprisonment. Challenging the said conviction and sentence, the appellants are before this Court with the present Criminal Appeal.

3.The case of the prosecution in brief is as follows:-

(i) On 23.11.2011, PW6-Selvaraj the then Inspector of Police, Vadaseri Police Station, Kanyakumari District, while he was in patrolling duty along with PW3-Chandran, Murugesan and one David Rabinson, PW1-Krishnakumar and PW2-Iyyappan gave information as in Vadsari bus stand near to Supreme Hotel, some persons are selling the Buprenorphine injection, which is prohibited for sale under NDPS Act.

(ii) After receipt of the said information, PW6 along with PW1 to PW3 went to Vadaseri bus stand wherein after seeing the Police party, the accused herein attempted to run away from the place, wherein he was standing. However, the police party headed by PW6, secured the accused and informed about the rights, in respect to the search guaranteed in their favour under Section 50 of NDPS Act. In respect to the said information, both the accused did not want to exercise the said right and permitted the police officers to conduct search over them. In this regard, the joint consent letter given by both the accused is marked as Ex.P4. After obtaining the said consent letter, during the time of search, the Police party found that the first accused possessed with 12 numbers of Buprenorphine injection in the quantity of 2 ml, 4 numbers of Tenergran, three bottles of phenergen and 13 bottles without any labels. Further, they find out that the accused was possessed with six syringe and Rs.3,000/- which is the sale price. After identifying the said contraband, PW6, in the presence of PW3 prepared the Seizure Mahazar and recovered the same. Further, in the presence of same witness, PW6 obtained confession statement from the accused.

(iii) In continuation of investigation, after made recovery PW6 brought the accused with recovered contraband to the Police Station and registered the case against them in Crime No.2940 of 2011 under Section 8(C) r/w 22(b) of NDPS Act. The printed FIR is marked as Ex.P7. After registration of the case, he visited the scene of occurrence and prepared the Observation Mahazar in the presence of PW5-Kannan and one Ayyappan. He has drawn the rough sketch under Ex.P9. He examined the witnesses and recorded their statements. He made arrangements for sending the accused to the judicial custody. He submitted an application in the Court praying to send the recovered contraband for chemical examination. After completing the above formalities, since he was transferred from the said post, he handed over the case records to PW7 for further

(iv) PW7-Periyasamy the then Inspector of Police, Vadaseri



Police Station, on receipt of the case records, examined the witnesses, who are all already examined by PW6. Since those witnesses gave the same statements, he has not recorded separate statements from them. In the meantime, upon the request given by the Investigation Officer, the learned Additional District Judge, Principal Special Court for EC & NDPS Act Cases, Madurai, issued the proceedings to send the recovered contraband for chemical examination. In turn, PW4-Srividya Srinivasan, Scientific Assistant, Forensic Science Department, Chennai, examined the recovered contraband and issued the certificate under Ex.P3 stating that there was Buprenorphine found in 11 class bottles, which is prohibited under NDPS Act. After receipt of the said report, PW7 examined PW4 and recorded the statement. Ultimately, on verification of records, PW7 came to the positive conclusion that both the accused are liable to be convicted under Section 8(C) r/w 20(b) of NDPS Act. He filed the final report accordingly.

4. Based on the materials available on record, the trial Court framed the charge for the offence under Section 8(C) r/w 22(b) of NDPS Act. The accused denied the charges and opted for trial. Therefore, the accused were put on trial.

5. During the course of trial proceedings, in order to prove their case, on the side of the prosecution, as many as 7 witnesses were examined as PW1 to PW7 and 15 documents were exhibited as Ex.P1 to Ex.P15.

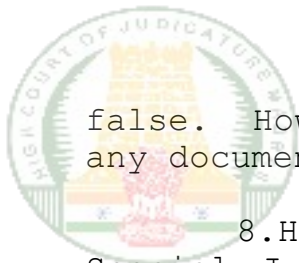
6.(i) Out of the above said witnesses, PW1 and PW2, who are the alleged informers informed about the possession of contraband did not give any evidence in support of the case of the prosecution. Hence, they were treated as hostile witnesses. PW3-Chandran the then Head Constable, Vadaseri Police Station, speaks about the occurrence as during the relevant point of time, he was present along with PW6 in Vadaseri bus stand and secured the accused and after following the rules contemplated under NDPS Act, recovered the contraband from the accused.

(ii) PW4 -Srividhya Srinivasan, Scientific Assistant, Forensic Science Department, Chennai, speaks about the examination of contraband, which was alleged to be recovered from the accused and about the issuance of certificate. PW5-Kannan is the alleged witness to the preparation of Observation Mahazar. He has not given evidence in support of the prosecution and therefore, he was treated as hostile witness.

(iii) PW6-Selvaraj and PW7-Periyasamy, are the Police Officers who gave evidence in respect to the receipt of information, details of the search made on the accused, recovery of contraband, sending the contraband to the chemical examination and about the filing of final report.

<https://hcservices.ecourts.gov.in/hcservices/>

7. When the above incriminating materials were put to the accused under Section 313 of Cr.P.C., the accused denied the same as



false. However, they did not choose to examine any witness nor mark any document on his side.

8. Having considered all the above, the learned II Additional Special Judge for NDPS Act Cases, Madurai, came to the conclusion that both the accused are guilty under Section 8(C) r/w 22(b) of the NDPS Act and accordingly, convicted and sentenced the accused as stated in paragraph No.2 of this judgment. Aggrieved by the said conviction and sentence, the appellants/accused are before this Court with this appeal.

9. I have heard Mr.V.Kathirvel, learned senior counsel appearing for the first appellant, Mr.N.Mohidheen Basha, learned counsel appearing for the second appellant and Mr.M.Muthumanikkam, learned Government Advocate (crl.side) appearing for the State and also perused the records carefully.

10. The learned counsel appearing for the appellants would contend that in the present case, during the time of investigation, the procedure adopted by the Investigation Officer, are all in violation of Sections 42, 50 and 57 of NDPS Act and therefore, due to the failure of mandatory requirements, it cannot be held that the prosecution has proved its case beyond reasonable doubt. Accordingly, they prayed to set aside the conviction and allow the appeal.

11. Per contra, the learned Government Advocate (Crl.side) appearing for the State would contend that the evidence put forth by the prosecution are sufficient to hold that the accused are possessed with banned contraband at the relevant point of time. According to him, interference of this Court in the finding arrived at by the trial Court, does not require.

12. I have considered the rival submissions made by the learned counsel appearing on either side.

13. First of all, it is the evidence given by PW6 and PW3 is that while at the time they were in patrolling duty in Vadaseri bus stand, they got information about the possession of banned contraband. The said information have not recorded in writing and submitted before their Superior Officer. In this regard, it is the contention raised by the learned senior counsel for the first appellant that though the Investigation Officer got information in the public place, it is the duty to record the said information after recovering the contraband from the accused. By arguing as above, he relied on the judgment rendered by our Hon'ble Apex Court in Crl.A No.36 of 2003, dated 29.07.2009, in the case of **Karnail Singh Vs State of Haryana**, wherein, it has been held as follows:-

"In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede



the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency"

14. Further reiterating the said observation in Crl.A.No.421 of 2021 in the case of **Boota Singh & others Vs State of Haryana**, reported in **LL 2021 SC 218**, wherein our Hon'ble Apex Court has held as follows:-

10. In *Karnail Singh*, the Constitution Bench of this Court concluded:-

"35. In conclusion, what is to be noticed is that *Abdul Rashid* [(2000) 2 SCC 513 : 2000 SCC (Cri) 496] did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did *Sajan Abraham* [(2001) 6 SCC 692 : 2001 SCC (Cri) 1217] hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

(a) The officer on receiving the information [of the nature referred to in sub-section (1) of Section 42] from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42 (1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official



superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section

42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001." (Emphasis added)

15. So, the decision rendered by our Hon'ble Apex Court is quite clear that though the situation is not accommodated for recording the information, it is for the Officer, who got information, to record the said information immediately he reaches the police station. But in this case, nothing was done by PW6. Therefore, the requirement of Section 42 of NDPS Act is not complied with in this case.

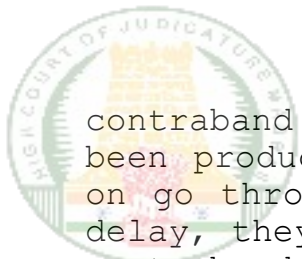
16. Secondly, in respect to the submission that there was a violation in respect to Section 50 NDPS Act, on considering the said submission with relevant records, it seems that after securing the accused, PW6 and PW3 obtained joint consent letter from both the accused. In this aspect, it is necessary to find out that whether the joint consent letter in respect to the communication of right available under Section 50(1) of NDPS Act is sufficient and valid in law. On this occasion, it is relevant and useful to see the judgment of this Court reported in **(2014) 5 SCC 335** in the case of **State of Rajasthan Vs V. Parmanand and others**, wherein it has been



held as follows:-

14. In our opinion, a joint communication of the right available under Section 50(1) of the NDPS Act to the accused would frustrate the very purport of Section 50. Communication of the said right to the person who is about to be searched is not an empty formality. It has a purpose. Most of the offences under the NDPS Act carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. These are minimum safeguards available to an accused against the possibility of false involvement. The communication of this right has to be clear, unambiguous and individual. The accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. A joint communication of the right may not be clear or unequivocal. It may create confusion. It may result in diluting the right. We are, therefore, of the view that the accused must be individually informed that under Section 50(1) of the NDPS Act, he has a right to be searched before a nearest gazetted officer or before a nearest Magistrate. Similar view taken by the Punjab & Haryana High Court in *Paramjit Singh* and the Bombay High Court in ***Dharamveer Lekhram Sharma*** meets with our approval. It bears repetition to state that on the written communication of the right available under Section 50(1) of the NDPS Act, respondent No.2 Surajmal has signed for himself and for respondent No.1 Parmanand. Respondent No.1 Parmanand has not signed on it at all. He did not give his independent consent. It is only to be presumed that he had authorized respondent No.2 Surajmal to sign on his behalf and convey his consent. Therefore, in our opinion, the right has not been properly communicated to the respondents. The search of the bag of respondent No.1 Parmanand and search of person of the respondents is, therefore, vitiated and resultantly their conviction is also vitiated.

17. Accordingly, informing the right available under NDPS Act jointly to the several accused is a clear violation of Section 50(1) of NDPS Act. In this case, vide Ex.P4, PW6 jointly communicated the right available to the accused and thereafter, he got signature from both the accused in a single consent letter. Therefore, the said lapse committed by the Investigation Officer amounts to violation of mandatory requirements, which are necessary to comply under Section 50(1) of NDPS Act. Therefore, in this aspect also, the procedure adopted by the Investigation Officer is not in accordance with the rules contemplated under the Act.



contraband was recovered on 23.11.2011. Subsequently, the same has been produced before Court on 13.12.2011 in RPR No.194/2011. Now on go through the evidence given by PW6 and PW7 in respect to the delay, they have not offered any explanation as to why the recovered contraband was not sent to the Court immediately after the recovery. Further, they have not stated about in whose possession the said property was available in the interregnum period.

19.More than that, after the production of contraband in the Court on 13.12.2011, the Investigation Officer submitted the requisition for sending the contraband for chemical examination only on 29.01.2014. In fact, in Clause 13 of the Standing Instructions No.01/1988 issued by the Narcotics Control Bureau, New Delhi, is quite clear in respect to the time limit for despatch of sample to the laboratory. For easy reference, the same is extracted as follows:-

13.Mode and Time limit for despatch of sample to Laboratory;

The samples should be sent either by insured post or through special messenger duly authorised for the purpose. Despatch of samples by registered post or ordinary mail should not be resorted to. Samples must be despatched to the Laboratory within 72 hours of seizure to avoid any legal objection.

So, in this area also, the Investigation Agency without following any rules, sent the requisition with enormous delay.

20.Accordingly, after violating all the rules and regulations, the present case has been investigated by the Investigation Officer. The trial Court has also without seeing the rudimentary principle and without applying its mind, disposed of the case after awarding the punishment to the appellants, which is nothing but erroneous one.

21.In the light of the forgoing discussions, I am of the opinion that the conviction and sentence passed by the trial Court is liable to be set aside. Accordingly, this Criminal Appeal is allowed and the conviction and sentence imposed on the appellants/accused, by the II Additional Special Court for NDPS Act Cases, Madurai, dated 06.02.2016 is set aside and the appellants/accused are acquitted from all the charges. The fine amount, if any, paid by them, shall be refunded to them. Bail bond, if any, executed by the appellants shall stand cancelled.

Sd/-

Assistant Registrar (CS-II)

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Sub Assistant Registrar(CS)



To:-

1.The II Additional Special Judge for NDPS Act Cases, Madurai.

2.The Inspector of Police,
Vadaseri Police Station,
Kanyakumari District.

3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

4.The Section Officer,
Criminal Section records,
Madurai Bench of Madras High Court,
Madurai.

+2 CC to M/s.S.BALAJI, Advocate (SR-27418[F] dated 26/08/2021)

Crl.A. (MD) No.70 of 2016

25.08.2021

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